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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

2003043-US

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Application Number

10/585,120

Filed

May 29, 2007

First Named Inventor

Poulsen

Art Unit

3761

Examiner

Chapman

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐ applicant/inventor.

/Nick Baumann/ via EFS

Signature

☐ assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)

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October 15, 2009

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.

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Pre-Appeal Brief Request for Review

Applicants:	Poulsen et al.	Art Unit:	3761
Serial No.:	10/585,120	Examiner:	Ginger T. Chapman
Filed:	May 29, 2007	Conf. no.	9910
Title:	OSTOMY BAG		

This communication is in response to the Final Office Action mailed on April 28, 2009 ("FOA") and the Advisory Action mailed on July 27, 2009 ("AA").

Claims 1-12 and 19-20 were rejected under 35 U.S.C. § 103 as unpatentable over Jensen, US Patent No. 4,411,659 ("Jensen") in view of Nystrup, WO01/34072 ("Nystrup").

The Examiner's Explanation in the Advisory Action includes Clear Error

The Examiner takes the position in the AA that the limitation in independent claim 1 that a gap between the two opposed surfaces, at the constrictions, is "significantly smaller" than the largest width of the constrictions does not set forth the metes and bounds of how much smaller the gap is required to be, and that the applicant provides no criticality for the specific size of the gap. This statement includes clear error.

The application as filed teaches between page 1, line 27 and page 2, line 18 the definition of "significantly smaller." Moreover, the application as filed at page 2, line 17 distinguishes what "significantly smaller" is in the context of the cited reference of Jensen.

Thus, the statement by the Examiner in the AA that "the specification contains no disclosure of either the critical nature of the claim limitations nor any unexpected results arising therefrom" is based on clear error. In addition, we note that the Examiner called the issue of the language "significantly smaller" to our attention for the first time in the AA.

The Examiner takes the position in the AA that the gaps in Jensen perform the substantially identical function of providing a gas flow path with constrictions preventing obstruction of the gas pathway and filter solid and liquid wastes in the space between the constrictions. The Examiner concludes that Jensen discloses the same elements that perform the same functions where the only difference is the relative sizes. This position is clearly in error.

The Examiner interprets Jensen to provide a pre-filter illustrated in Figure 6 having two opposed, substantially liquid impermeable surfaces 30, 35 including therebetween a number of constrictions 32, 33. In the FOA, the Examiner cites to Jensen at column 4, lines 24-25 as

defining a gap (not identified) between opposed surfaces. In fact, Jensen discloses between lines 24-45 that liquid or semisolid matter that passes through aperture 20 into chamber 22 (see Figure 1) is expected to flow downward for drainage from the pouch. Consequently, it is the distance between the wall 13 and wall 12 that allows the liquid or semisolid matter to fall into the pouch under gravity. The Examiner's assertion that "the only difference is the relative sizes of the components" is clearly in error, and in fact, Jensen functions differently as based on the disclosure in Jensen.

We specifically address the Examiner's comments at item 15 of the FOA at page 5 where the Examiner argues that if the spacing between the screen ribs is too wide, then solid particles will pass the pre-filter and collect on the filter. In the alternative, the Examiner argues that if the spacing between the screen ribs is too narrow, then solid particles would collect on the pre-filter screen.

The Examiner's argument in fact supports the applicant's position that the claimed pre-filter will perform differently than the ribs disclosed in Jensen and the valve disclosed in Nystrup. The ribs in Jensen would perform differently than the claimed device that requires a gas channel defined by two opposed surfaces defining there between a number of constrictions and a distance defining a gap between the two opposed surfaces (see Figure 2 of the application as filed). As a consequence, the Examiner's contention at page 6 of the FOA and in the AA that the only difference between the cited references and the pending claims is the recitation of the "gap" dimension is incorrect.

The Rejections include Clear Error

Jensen discloses an ostomy bag including a filter. With reference to Figure 1, Jensen discloses a first wall 11 having an opening 16, a middle wall 13 having an opening 20, and an exterior wall 12 having an opening 23. The openings 16, 20, and 23 are spaced apart laterally to form a serpentine path (column 4, lines 25-35) configured to prevent solids from contacting the filter and prevent surges of gas that might otherwise rupture or damage the filter.

Nystrup discloses a foam 7 filter disposed between films 1, 3.

Independent claim 1 requires a pre-filter defining a gap between two opposed surfaces, at the constrictions, that is significantly smaller than the largest width of the constriction.

The "gap between two opposed surfaces, at the constrictions" is illustrated in the pending application at Figure 2. In contrast, **the Examiner has not identified where Jensen discloses a distance defining a gap between the two opposed surfaces, at the constriction(s), as required by independent claim 1.**

The Examiner interprets Jensen to provide a pre-filter illustrated in Figure 6 having two opposed, substantially liquid impermeable surfaces 30, 35 including therebetween a number of constrictions 32, 33. With reference to Figures 5 and 6, elements 30, 35 that the Examiner interprets to be opposed, liquid impermeable surfaces are in fact opposite sides of a circular flange 35. The flange 35 merely retains filter 26. **If the Examiner is interpreting the "gap between two opposed surfaces, at the constrictions" to be the lateral distance between surface 30 and surface 35, then the gap between the two opposed surfaces, at the constrictions, is not smaller than the largest width of the constriction, which directly contradicts independent claim 1.**

However, the Examiner proposes at page 5 of the FOA that the width and the distances cannot be determined from the drawings since the drawings in Jensen are not to scale. We believe this position to be irrelevant in that Jensen additionally discloses at column 5, lines 43-50 that the body section 27 of the holder includes flange 35 that projects forward from base wall 30 and, together with that base wall 30, defines a chamber or recess 36 for receiving filter 26. Thus, even if the dimensions are indefinite due to not being drawn to scale, Jensen still expressly requires that the flange 35 (cited by the Examiner as having opposed liquid impermeable surfaces 30, 35) be of such a depth as to define a recess 36 for receiving filter 26. Consequently, the gap distance between surface 30 surface 35 as cited by the Examiner will always be larger than the largest width of the ribs that are disposed within flange 35 (see, e.g., Jensen at Figure 5).

Alternatively, if the Examiner is interpreting the "gap between two opposed surfaces, at the constrictions" to be the diameter of the opening formed in flange 35, then the gap between the two opposed surfaces at the constrictions could not reasonably be smaller than the largest width of the constriction, as required by independent claim 1.

Independent claim 19 requires a pre-filter with a first surface, a second surface having at least one constrictive structure, the second surface positioned a first distance from the first surface so as to define a gas path between the first surface and the second surface and the

constrictive structure is positioned in the gas path a second distance from the first surface, wherein the second distance is less than the first distance and is selected such that a gap between the constrictive structure and the first surface functions as a filter to permit the flow of gas and hinder the flow of liquids, solids, and semi-solids towards an outlet of the pre-filter. Jensen, alone or in combination with Nystrup, fails to teach or suggest this combination of limitations as required by claim 19.

Dependent claim 10 requires that one of the opposed surfaces is defined by part of the wall of the bag. The Examiner cites to element 33 in Jensen as providing a surface of wall 12 of the bag. This interpretation contradicts the Examiner's assertion (page 4) that the gas channel 25 illustrated in Figure 6 of Jensen is defined by two opposed surfaces 30, 35. In any regard, element 33 is the back edge of a rib and is not "a part of the wall of the bag" as required by independent claim 10.

Dependent claim 12 requires that the distance of the gap is zero in a first state and greater than zero in a second state. The Examiner concedes that Jensen does not teach or suggest this feature, but cites to Nystrup in Figure 14 as illustrating constrictions 25, 26. Elements 25, 26 of Nystrup are embossed portions of a film. While we do not acquiesce to the modification of Jensen in view of Nystrup, we note that even if the references are so modified, that this modification would necessarily require the ribs of Jensen to have zero spacing, and thus form a solid impermeable wall in the flow path. No such unreasonable interpretation could form the basis of a rejection for obviousness under section 103.

Claim 20 further defines independent claim 19 and requires at least one channel positioned adjacent the at least one constrictive structure so that non-gaseous material flow encumbered by the gap is directed into the channel. None of the cited references teach or suggest at least this limitation.

The Examiner takes the position at page 7 of the FOA that Nystrup discloses constrictions 26, 7 between surfaces 1, 3. We disagree. Nystrup discloses that item 7 is a pressure plate formed of foam. The instant application teaches at page 1 that pre-filters made of foam have the potential to become easily clogged. Nystrup discloses at page 11, lines 15-17 that canals 26 are "hardly visible," and in addition, canals 26 do not extend between opposed impermeable surfaces 1, 3. In any regard, modifying Jensen to include canals 26 that are so

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small as to be hardly visible could be expected to result in clogging of the filter or clogging of the pre-filter.

Thus, it is believed that claims 1-12 and 19-20 are patentable over Jensen in view of Nystrup.

Respectfully submitted,

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